



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL CASE NO. 60 OF 2013

**MALINDI GINNERIES
LIMITED.....PLAINTIFF/APPLICANT**

=VERSUS=

KALSI

SHABAAN

SAWA

ALI

MALINDI

1. PRITPAL SINGH

2. ABDUL HASSAN

3. KASSIM ALI

4. ALI MOHAMED

5. DR. NUREIN t/a STAR HOSPITAL

**6. THE HON. ATTORNEY GENERAL *for and on behalf of* THE COMMISSIONER OF
LANDS**

**7. MUNICIPAL COUNCIL OF
MALINDI.....DEFENDANTS/RESPONDENTS**

RULING

1. What is before me is the Plaintiff's Application dated 10th April, 2013 and filed on the same day. The Application is seeking for the following reliefs:
 1. ***An interlocutory injunction do issue to restrain the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants and or any other third parties by themselves and or their servants, and or agents and or employees and or howsoever from either entering upon occupying, constructing on or developing or selling, transferring, charging, mortgaging or in any other manner whatsoever and howsoever interfering with the suit premises and title thereof and or dealing with or transacting with the property the subject matter of this suit and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of all those pieces of parcels of land the suit premises known as portion no.10811 (original portion number 1725/22)measuring 0.00745 hectares situated at Malindi Town within Malindi Municipality together with all the buildings and developments thereon, if any, or by***

- any other posts or future number or description that may be accorded to them, (hereinafter referred to as “the suit premises”) pending the hearing and determination of this suit.*
- 2. An interlocutory order do issue directing the Commissioner of Lands and the Registrar of Titles to ensure that no other titles or transfers or sub-divisions or leases in respect of the suit premises are registered that derogate from or subtract or diminish or in any other manner whatsoever take away from or negate the title of the Plaintiff in the said property or alters the status quo herein above described.*
 - 3. An order do issue directing the Commissioner of Lands and the Registrar of Titles to ensure that no other titles or transfers or subdivisions in respect of the said piece of parcel of land are registered that derogate from or subtract or diminish or in any other manner whatsoever take away from or negate the title of the Plaintiff in the said property the suit premises herein above described.*
 - 4. THAT an order do issue directing the Commissioner of Police and the OCPD Malindi and OCS in charge of the nearest Police Station to enforce and ensure compliance with the Court's orders and ensure that neither the Defendants or any one of them or any other third parties of any description are allowed to access or enter upon and or remaining on or continuing in occupation of all that piece or parcel of land the subject matter of this suit and hereinabove described.*
 - 5. That direction is given for the service of the Plaint, Summons, Verifying Affidavit, Authority Under Seal, List of Witnesses, Witness Statements, the Plaintiff List and Bundle of Documents, Certificate of Urgency, Notice of Motion, Affidavits, all Pleadings filed herein and Orders made herein on the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents by advertisement in one newspaper with a national circulation and affixing of the same in a conspicuous part of the suit premises and for all other necessary steps herein.*
 - 6. THAT the costs of this application be provided for.*
2. Prayer (e) was granted by the court on 11th April, 2013.
 3. The Application is supported by nine grounds which have also been replicated in the Supporting Affidavit of the Plaintiff's director.
 4. The Plaintiff's director has deponed that for the past 79 years, the Plaintiff has been the legal and beneficial owner and entitled to possession and peaceful enjoyment of land known as Portion numbers 10811 (original portion number 1725/22) Malindi measuring 0.0745 hectares and portion number 10812 (Original portion number 1725/23) Measuring 0.0955 hectares (the suit premises).
 5. According to the depositions by the Plaintiff's director, the Plaintiff purchased the suit premises for valuable consideration vide an indenture dated 28th February, 1934 and that it received a formal conveyance and a title was issued to it in fee simple free from any encumbrances and absolutely.
 6. The Plaintiff's director further deponed that the two suit premises formed a part of portion number 1725 before a subdivision proposal was submitted for approval by the Plaintiff who was the registered proprietor, whereupon the subdivision was approved by the Commissioner of Lands on 6th October 1969. The subdivision gave rise to portions numbers 2026 through to 2043, portion number 1725/R plus one open space and one car-park.
 7. Other than the open space, which, according to the Plaintiff is what is now known as portion number 10811 and the car park, which is now known as 10812 (the suit premises), sub plots numbers 2026 through to 2043, both numbers inclusive were then registered in favour of the Plaintiff.
 8. It is the Plaintiff's director's deposition that in accordance with the then Town Planning Act, the suit properties were supposed to be processed for surrender to the 7th Defendant as Trustee to hold and use the same on behalf of and only for the benefit of the public and for the purpose for which they were to be surrendered by the Plaintiff to the 7th Defendant failing which they ought to and must revert back to the Plaintiff.
 9. It is the Plaintiff's director's deposition that the suit premises which were to be processed for surrender by the Plaintiff, but which were in fact not so processed or surrendered in accordance with the law were deemed to be held under a statutory trust for public purposes and for the public benefit by the 7th Defendant as a Trustee, with the statutory dictum that the suit premises were to

- be used only for the purposes for which the Plaintiff surrendered them for or by operation of the law be returned to the possession, control and ownership of the Plaintiff.
10. However, between the year 2000 and 2002, the 6th and 7th defendants issued and or caused to be issued to and registered an indenture in respect of portion number 10811 (original number 1725/22) to the 2nd Defendant who purported to be a purchaser of the same from the 1st Defendant who had falsely alleged to have purchased it from the Plaintiff.
 11. The 2nd Defendant, it was deponed, transferred portion number 10811 to the 3rd Defendant by way of an indenture, who in turn transferred the same property to the 4th Defendant.
 12. In respect to portion number 10812 (original number 1725/22), the Plaintiff's director deponed that the 6th and 7th Defendants registered an indenture in favour of the 5th Defendant who they falsely purported to be an allottee and or a grantee.
 13. The Plaintiff's director finally deponed that the suit premises were not available for alienation by the 6th and 7th Defendants and the issuance of the Grant under the operation of the law to the 1st and 5th Defendants and subsequently to the 2nd, 3rd and 4th Defendants was fraudulent, illegal, null and void ab initio; that the Plaintiff actually secured a deed plan in respect to the plot number 10811 which file was either stolen or is missing in the 6th and 7th Defendant's offices and that the Defendants are now trespassing on the Plaintiff's land and property and clandestinely undertaking illegal construction thereon.
 14. The Defendants were served with the pleadings by way of advertisement in the Standard Newspaper of 19th April, 2013.
 15. The 4th and 5th Defendants filed their Replying Affidavits on 28th May, 2013 and 13th May, 2013 respectively. The 1st, 2nd, 3rd, 6th and 7th Defendants did not file any response to the Plaintiff's Application.
 16. The 4th Defendant deponed that he purchased portion number 10811, Malindi from the 3rd Defendant on 8th October, 2007. The 3rd Defendant informed him that he had purchased the property from the 2nd Defendant who in turn had purchased it from the 1st Defendant.
 17. The 4th Defendant/Respondent has further deponed that he submitted the building plans which were approved in November 2008 by the Municipal Council of Malindi and he was issued with the NEMA license allowing him to commence construction on portion number 10811; that he has let the premises to tenants and that the Plaintiff never raised any objection when he was constructing "Elite Plaza" and that he is an innocent purchaser for value without notice.
 18. On his part, the 5th Defendant deponed that he built "Star" Hospital on plot number 236 between 1989 and 1992.
 19. According to the 5th Defendant, there was an empty land adjoining the hospital, that's plot number 10812 (1725/R) Malindi. The 5th Defendant has deponed that he set about constructing a car park on plot number 10812 from around 1989 until 1993. He sought and obtained permission from the Municipal Council of Malindi in 1991 to develop the said car park.
 20. The 5th Defendant stated that he has had open, notorious, continuous, and uninterrupted occupation and possession of the car park from 1989 and that he obtained permission to build a mortuary on the said parcel of land from the Municipal Council of Malindi on 31st March 1995. He completed constructing the mortuary in the year 2000 and was issued with an occupation licence.
 21. The 5th Defendant further deponed that the Plaintiff knew that he had developed the car park and the mortuary without his consent; that his occupation of the land has been open and that the Plaintiff's suit is time barred pursuant to the provisions of section 7 of the Limitation of Actions Act.
 22. The 5th Defendant finally deponed that he will be filing an Originating Summons so that he can be registered as the owner thereof; that the Plaintiff's right to the land in question, if any, was extinguished in or about 2001 and that he has used plot number 10812 (1725/R) as a right of way and for light and air to and from the hospital and for parking for the purposes of the hospital for over 20 years. Consequently, he has an easement under section 32 of the Limitation of Actions Act and the easement is absolute and indefeasible.
 23. The Plaintiff filed his Supplementary Affidavit on 29th May, 2013 while the 5th Defendant filed

his further affidavit on 13th June, 2013.

24. In the Supplementary Affidavit, the Plaintiff has alleged that the 5th Defendant has been illegally and unlawfully allocated the public land earmarked for a public car park, which was previously the Plaintiff's land; that the Director of Survey extinguished the suit premises and amalgamated it with the Defendant's portion number 5151 then creating portion number 13279 and a new title has been issued to the 5th Defendant.
25. The Plaintiff pointed out that the 5th Defendant's annexures marked "DN1" and "DN2" shows that the 5th Defendant sought to develop a car park as a "public car park" and not as a private car park; that the 5th defendant has not annexed the Minutes of the Council approving the allocation of the plot to him and that the 5th Defendant has never had any open, notorious, continuous and uninterrupted occupation and or possession of the car park from 1989 or at all.
26. The 5th Defendant stated that from the Plaintiff, the Plaintiff has admitted that he did not surrender any part of the suit premises and that he has sued the 6th and 7th Defendants claiming ownership of the suit premises and that no evidence has been tendered to show that the suit premise is public land.
27. The Plaintiff's advocate filed his written submissions on 13th June, 2013 while the 4th and 5th Defendants' advocates filed their submissions on 28th June, 2013 and 24th June 2013 respectively. I have considered the written submissions by the parties and oral submissions that were made by the Plaintiff's advocate and the 4th Defendant's Advocate on 1st July 2013.
28. The case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 318** laid down the principles applicable for the grant of an injunction. Firstly, the Applicant must show a prima facie case with chances of success and secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and lastly, if the court is in doubt, it will decide the Application on the balance of convenience.
29. A prima facie was defined by the Court of Appeal in the case of **Mrao Limited VS First American Bank Ltd & 2 others (2003) KLR 137** as follows:

"In Civil Cases it is a case in which on the material presented to the court on or a tribunal properly directing itself will conclude that there exists a right, which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.."

30. For me to decide as to whether or not the Plaintiff has established a prima facie case with chances of success, I should address the following issues which have arisen from the pleadings before me.

1. ***Whether the Plaintiff's pleadings are inconsistent.***
2. ***Whether the Plaintiff was the registered owner of land portion number 1725.***
3. ***Whether portion number 1725 was subdivided to create portion numbers 2026 through to 2043 and 1725/R.***
4. ***Whether portion number 1725/R was set aside for public purpose.***
5. ***Whether portion number 1725/R was sub-divided to create portion number 10811 and 10812 which was allocated to the Defendants.***
6. ***Whether portion numbers 10811 and 10812 were available for allocation.***
7. ***Whether the 5th Defendant can raise the defence of adverse possession in the circumstances of this case.***

Whether the Plaintiff's pleadings are inconsistent or not.

31. The 5th Defendant's Advocate submitted that the Plaintiff has stated in his Plaintiff and Application that he is the lawful owner of the suit premises, but changed his position when the 5th Defendant filed his defence and claimed that the suit property is Government land.
32. One of the prayers in the Plaintiff's Plaintiff is for a declaration that the titles that were issued to the 1st and 5th Defendants over portion number 10811 and 10812 respectively were issued *ultra vires* the 6th and 7th Defendants' statutory powers and thus illegal, null and void *ab initio*.

33.The Plaintiff has pleaded numerous particulars of fraud in his Plaintiff to show why the titles which were issued to the 1st to 5th Defendants should be declared null and void *ab initio*.

34.Some of the particulars of fraud are framed as follows:-

(a) The 7th Defendant failed, refused and or neglected to uphold its statutory duty and fraudulently abetted the subversion of that duty to, inter alia, preserve public spaces (emphasis added) and suit premises by permitting the Defendants to construct thereon or alternatively failing, refusing or neglecting to stop and prevent them from such constructions.

(b) The 7th Defendant positively and maliciously intended and did subvert its statutory duty and fraudulently abetted the subversion of that duty to, inter alia preserve public space and the suit premises by permitting the Defendants to excise and obtain the grant and hold the same in relation to the suit premises.

(c) The 7th Defendant failed, refused and or neglected and further fraudulently avoided to give notice to the Plaintiff that they no longer needed the suit premises for the purpose for which the Plaintiff surrendered the suit premises and sought instead to illegally and unlawfully, dispose of the suit premises.”

35.The above quoted particulars of fraud were repeated throughout the Plaintiff's Plaintiff, Application and supporting affidavit in different versions.

36. Indeed, what arises from the Plaintiff's Application and the Plaintiff is this; that the Plaintiff surrendered portion number 1725/R plus one open space and one car park as a condition precedent for the sub-division of Portion number 1725; that the surrendered portions of land were to be held in trust for the people of Malindi by the 6th and 7th Defendants and in the event that the said parcels of land were not required for the public purposes they were acquired for, they should have been registered in the name of the Plaintiff and not anybody else.

37. The Plaintiff, according to its pleadings, remained the beneficial or legal owner of the two parcels of land subject to their being utilised for public purposes.

38.I therefore do not see any contradiction in terms of the Plaintiff and the Notice of Motion as filed and the subsequent pleadings as alleged by the 5th Defendant.

Were portion numbers 10811 and 10812 parts of portion number 1725?

39.The Plaintiff filed as one bundle the Certificate of Urgency, the Notice of Motion, the Supporting Affidavit, the Plaintiff, the List of Witnesses, the Witness Statements and the List and bundle of documents. The bundle is paginated.

40.The Plaintiff's Supporting Affidavit does not have annexures. It would however appear that the Application is supported by the Affidavit together with the bundle of documents which were filed and served together and paginated from number 1 to 138.

41. In view of the provisions of Article 159(2) (d) of the Constitution which obligates this court to administer justice without undue regard to procedural technicalities and section 3 (1) of the Environment and Land Court Act NO.19 of 2011, I will refer to the Plaintiff's bundle of documents in determining the issues that I have highlighted above.

42.According to the Indenture made on 28th February, 1934, which is at page 130 of the Plaintiff's bundle of pleadings and documents, Gulamhussein Esmailji Essaji sold to the Plaintiff plot number M.7 measuring 11.5 acres or thereabout for Kshs.1,000.

43.The said property, according to the indenture at page 130 of the Plaintiff's bundle, was delineated and described on Deed Plan number 3044 and attached to the Certificate of Ownership number 240 dated 3rd December 1912. The indenture was registered in the Mombasa Registry on 5th March 1934.

44.At page 132 of the Plaintiff's bundle is a title in respect to plot number M.7 measuring 11.56 acres. The title was issued under the Land Titles Ordinance, 1908 and it is marked as number 240. This is the same title that was referred to the 1934 indenture.

45.At page 133 of the bundle is a deed plan in respect of portion number 1725. At the top of the deed

- plan, it is indicated that portion number 1725 measuring 10.80 acres was a subdivision of M. 77 the land which the Plaintiff purchased in 1934.
46. From the Sketch Plan at page 134 of the Plaintiff's bundle, it would appear that portion number 1725, which was a subdivision M. 77, was sub-divided to give rise to portion numbers 2026 through to 2043 and 1725/R. "R" in the survey lingo always denotes the remainder of a piece of land after subdivision.
47. Other than the sketch plan at page 134, the Plaintiff did not annex in his bundle the survey plan showing the said sub-divisions.
48. The Plaintiff has however included in his bundle of documents Survey Plan folio number 196/107 at page 136 in respect to portion number 1725/R, which, as I have indicated above denotes that it was the land that remained after portion number 1725 was sub-divided.
49. The said Survey Plan (F/R 196/107) shows that portion number 1725/R was sub-divided vide survey plan F/R 303/72 which, according to the indent dated 30th January 2001 from the survey of Kenya at page 112 of the bundle created portion numbers 10811 and 10812 (the suit properties). Survey Plan F/R 303/72 which created portions numbers 10811 and 10812 is at page 137 of the Plaintiff's bundle with the original numbers being 1725/22 and 1725/23 respectively.
50. The above chronology shows that prima facie, portion numbers 10811 and 10812 were originally part of portion number 1725/R which was the "remainder" of portion number 1725. Portion number 1725 is the land that the Plaintiff purchased in 1934. These facts were not rebutted by the Defendants.

Was portion number 1725/R set aside for public purpose?

51. I have found, prima facie, that portion number 10811 and 10812 formed part of portion number 1725/R which was sub divided to create portion numbers 1725/22-23 and then changed to portion number 10811-10812 respectively.
52. The Plaintiff has deposed in its affidavit that pursuant to the requirements of the then Town Planning Act, it surrendered a portion of its land to be used as an open space and car park. The Plaintiff has averred that the open space is currently registered as portion number 10811 while the portion that it surrendered for the car park is now known as portion number 10812.
53. The fact that the portion that was meant for the car park is now known as portion number 10812 is supported by the depositions of the 5th Defendant who has deposed at paragraph 3 of his Replying Affidavit sworn on 3rd May 2013 as follows:

"There was empty land adjoining the hospital. That is plot number 10812, Malindi (1725/R). I had planned and laid the hospital in a way that I would be able to utilise that empty land for hospital parking and expansion of the hospital and auxiliary services. There was a huge trench running through plot no.10812 (1725/R). In some places it was as deep as 6 to 7 meters. I needed to cover the trench so that I can build a car park and later on develop a mortuary on part of that car park. I therefore set about constructing the car park from around 1989. I had sought and obtained permission from the Municipal Council to develop the car park."

54. The 5th Defendant, by his own admission, has stated that, firstly, portion number 10812 was part of 1725/R, which I have found, prima facie, was the "remainder" of portion number 1725; secondly, that portion number 10812 was an empty land which he was to utilise as a car park and later on develop on it a mortuary and lastly that he constructed the car park on the said portion with the approval of the Council.
55. The 5th Defendant further deposed that he actually constructed the mortuary on part of portion number 10812 with the approval of the Council.
56. The 5th Defendant has annexed on his Replying Affidavit a letter dated 20th April 1989 addressed to the Municipal Council's Town Clerk. The first paragraph of the letter states as follows:

"I apply to the council to be allowed to develop a car park on the portion 1725/R as a public car park. The car park will also serve my proposed clinic on the adjacent portion of the building plan of which I am submitting together with it."

57.The 5th Defendant has annexed another letter dated 4th July, 1991 addressed to the Town Clerk which reads as follows:

“I am applying for authority to develop the above plot number 1725/R which is earmarked as a public car park for this purpose. The car park fronting my clinic on plot no.363/236 which is nearly completion, the car park will still remain public car park and will also serve my clinic. If permitted I undertake to do this project at my cost for the benefit of the people of Malindi.”

58.On 15th September 1991, the Municipal Council of Malindi responded to the 5th Defendant's letters as follows:

“The council has approved your application to construct a public car park for the general public use on plot number 1725/R earmarked for that purpose and which is adjacent to your clinic project.....”

59.The above correspondences between the 5th and 7th Defendants confirm, prima facie, the Plaintiff's depositions that portion number 1725/R was meant for the public to use as a car park.

60.The 5th Defendant has also annexed a letter dated 31st March 1995 by the Town Clerk of Municipal Council of Malindi to the 5th Defendant recommending the approval by the Council for the Construction of a mortuary on certain conditions.

61.The letter does not indicate the parcel of land upon which the mortuary was to be constructed neither does it say that the council had approved the construction of the said mortuary. The 5th Defendant did not annex the Minutes of the council approving the construction of a mortuary on the plot that had been set aside for a public car park.

62.The last document that the 5th Defendant annexed on his Replying Affidavit is an occupation permit by the Municipal Council of Malindi dated 16th November 2000. The said permit shows that the “Mortuary building” is erected on plot number 1725/R.

63.Whether portion number 1725/R was the land that was surrendered by the Plaintiff or not, which I have found, prima facie, it was, is immaterial. The said portion could only be used as a car park or for public purposes and not for the purposes of putting up a private mortuary.

64.Section 144(1) of the Local Government Act, Cap 265 (repealed) provided for the manner in which a local authority was supposed to deal with land which it had acquired by way of purchase, lease, exchange or gift.

65.That section provides that notwithstanding that such land was not required for the purpose it was acquired for, it may, until so required, be held and used for the purposes of any other functions of the local authority.

66.Section 144(3) of the Local Government Act, Cap 265 (repealed) addressed the manner in which land belonging to a local authority and which is not required for the purpose for which it was acquired for should be dealt with: Such land could only be appropriated for any other purpose for which the local authority is authorised to acquire land with the approval of the Minister for Local Government.

67.Section 144(6) of the Local Government Act (repealed) allowed local authorities to sell any of its land and which was not required for the purpose for which it was acquired or being used. But again, the approvals of the Council by way of resolutions of the full council meeting and the Minister are required in such a scenario. That, it would appear, did not happen in this particular case.

68.The 5th and 7th Defendants have not stated or shown that the land upon which the mortuary has been constructed was not required for public purposes or that indeed the Minister for Local Government gave approval for the appropriation of the land by the 5th Defendant.

69. Indeed, no material was placed before me to show that the Council approved the allocation of portion number 1725/R which had been earmarked for a public car park to the 5th Defendant or at all, or that the land was actually allocated to him by the Council.

70.The 4th Defendant has also not shown how the 1st Defendant was allocated portion number 10811

- which was, prima facie, part of portion number 1725 that was initially owned by the Plaintiff, and which, according to the Plaintiff, was surrendered for public purpose.
71. According to the Indenture dated 20th March, 2002 between the 1st Defendant and the 2nd Defendant, portion number 10811 (original number 1725/22) which is currently registered in the name of the 4th Defendant, was transferred to the 1st Defendant by the Plaintiff by virtue of an Indenture of conveyance dated 26th March, 1974.
 72. The Plaintiff has denied ever selling portion number 10811 to the Plaintiff. The Plaintiff has deponed that portion number 10811 was part of the land that it surrendered for public purpose, and specifically as an open space. It is the Plaintiff's deposition that that process was abandoned in relation to portion number 10811 and a deed plan was issued to the Plaintiff. It is therefore upon the 1st and 4th Defendants to show that the Plaintiff indeed sold the said portion to the 1st Defendant.
 73. Land which is set aside for public purpose cannot be allocated to individuals by the Council without following the provisions of the then Local Government Act, cap 265 or the Government Lands Act. Yet this is what has happened over the years. The allocation of such land for private purpose is even more serious when such land is surrendered by a legal person for public use.
 74. County Councils and Municipal Councils held land in Trust for the people ordinarily resident in the area. The trust doctrine had to be observed by the local authorities while dealing with parcels within their jurisdiction.
 75. To the extent that land remained unadjudicated, or if adjudicated it was surrendered to the Council for public purpose, it must be considered to be community land whose interest is of a public nature requiring protection against illegal and irregular allocation.
 76. Where land which has been surrendered is not required for the purpose it was surrendered for, then such land should revert back to the original owner. It is unacceptable and unlawful for a Council to allocate such land to a private entity. Such land can neither be alienated by the local authority nor the Government.
 77. In deed, where the court is satisfied on the evidence placed before it that land set aside or surrendered for public purpose was unprocedurally and unlawfully allocated to a private entity, it will not hesitate to order for the cancellation of such title notwithstanding the developments thereon.
 78. The drafters of the Constitution thought it wise, though not necessary, to remind all and sundry at Article 62(1) (c) that when land is transferred to the state by way of sale, reversion or surrender, such land becomes public land and its alienation has to be done strictly in accordance with the law.
 79. The dealings in the suit properties, which were initially surrendered by the Plaintiff, on the material placed before me, was not done in accordance with the law.
 80. The 5th Defendant has raised the defence of adverse possession; that the Plaintiff has known of his occupation and is time barred under section 7 of the Limitation of Actions Act.
 81. As I stated at the beginning of this Ruling, the Plaintiff's claim is that portion number 10812 was part of portion number 1725/R upon subdivision of portion number 1725 which belonged to the Plaintiff.
 82. By operation of the law, the Plaintiff's title in respect of portion number M 7 was extinguished when the land was subdivided.
 83. Portion number 10812 (original number 1725/23) is not registered in the name of the Plaintiff. All the Plaintiff is stating in its pleadings is that that land should be registered in its name in the event that the same is not utilised for the purpose that it was surrendered for.
 84. The 5th Defendant's Replying Affidavit clearly shows that the Defendant has always known or believed that portion number 10812 was initially an empty land and he has constructed on it a mortuary on that basis. I therefore do not see, prima facie, how the defence of adverse possession is available to the 5th Defendant's viz-a-viz the Plaintiff's claim in view of the circumstances of this case.
 85. The defence of adverse possession can only be available if the 5th Defendant would have admitted from the beginning that indeed portion number 10812 belongs to the Plaintiff and if the Plaintiff was in possession of the title for the said portion. He has not made such an admission.
 86. In the circumstances, and for the reasons I have given above, I am satisfied that the Plaintiff has

- established a prima facie case with chances of success.
87. This suit, in my view, is in the nature of a public interest litigation, which has been defined as litigation that is instituted with a desire that the court would be able to give effective relief to the whole or a section of society. The issues raised in this suit affect a significant number of people, and specifically the residents of Malindi, and not just the Plaintiff.
88. Consequently, an award of damages cannot adequately compensate the Plaintiff and the public at large in the event that the Defendants are allowed to deal with the suit property by transferring or charging it.
89. The irreparable damage that is likely to be suffered where property is reserved or surrendered for public purpose can never be substituted by an award of damages. One cannot even identify the people who should be compensated in the first place and the value for the usage of such property cannot be ascertained.
90. The Plaintiff is seeking for a mandatory injunction, and in the alternative for a prohibitory injunction. The grounds that the court should consider before granting a mandatory injunction are spelt out in *Halsbury's Laws of England, 4th Edition*, at paragraph 945 as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and can be remedied, or if the Defendant attempted to steal a march on the Plaintiff a mandatory order will be granted on an interlocutory application.”

91. The 4th Defendant has deponed that he has constructed on portion number 10811 a stored building otherwise known as “Elite Plaza.” The premises have been leased to several companies, including financial institutions. I do not think that the Plaintiff or the court will be able to remedy the situation in the event that the Plaintiff does not succeed in its claim should it stop the operations of the building on portion number 10811 and evict the tenants from the building at this stage. The same position applies to the mortuary that has been constructed on portion number 10812.
92. In the circumstances of this case, and in view of the establishments on the suit properties, I decline to grant an order of mandatory injunction.
93. However, having found that the Plaintiff has established a prima facie case with chances of success and the fact that damages will not be an adequate compensation in the event that the Plaintiff's suit succeeds, I hereby allow the Plaintiff's Application in the following terms:
- 1. An interlocutory order do, and is hereby issued directing the Commissioner of Lands and the Registrar of Titles to ensure that no other titles or transfers or sub-divisions or leases in respect of Portion number 10811 (original number 1725/22) Malindi and portion number 10812 (original number 1725/23) Malindi are registered that derogate from or subtract or diminish or in any other manner whatsoever take away from or negate the title of the Plaintiff in the said property or alters the status quo herein above described pending the hearing and determination of this suit.**
 - 2. The costs of the Application shall be borne by the Defendants.**

Dated and Delivered in Malindi this 20th day of August, 2013

O. A. Angote

Judge